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20 **UNITED STATES DISTRICT COURT**

21 **NORTHERN DISTRICT OF CALIFORNIA**

22 **SAN FRANCISCO DIVISION**

23 ORACLE AMERICA, INC.

Case No. CV 10-03561 WHA

24 Plaintiff,

**ORACLE'S MOTION IN LIMINE
REGARDING HINKMOND WONG AND
NOEL POORE**

25 v.

26 GOOGLE, INC.

Dept.: Courtroom 8, 19th Floor
Judge: Honorable William H. Alsup

27 Defendant.

1 Google's document disclosures for Oracle employees Noel Poore and Hinkmond Wong
2 suggest that Google intends to question both of these witnesses about issues that are irrelevant to the
3 patent infringement issues before the jury in Phase 2, and that pose a substantial risk of jury
4 confusion. Pursuant to Federal Rules of Evidence 402 and 403, Oracle moves *in limine* to exclude
5 the exhibits described in this motion and confine Google's questioning of Messrs. Poore and Wong
6 in this phase to topics relevant to the questions that the jury must decide now: Google's infringement
7 of Oracle's Java patents.

8 Mr. Wong, an Oracle engineer, was not on the trial witness list that Google served in October.
9 Google never sought his deposition during the entire period of fact discovery of the case. In February
10 2102, however, Prof. Cockburn submitted his third damages report, in which he disclosed that Mr.
11 Wong was one of the Java engineers who assisted Mark Reinhold in the "group and value" approach
12 to allocation of the patent portfolio. Shortly thereafter, on February 23, 2012, Google disclosed that
13 it was adding Mr. Wong to its witness list, focusing on his relevance to the damages case. Thus,
14 Google disclosed Mr. Wong as a witness as follows:

15 Mr. Wong is an Oracle engineer who may testify about work he performed in
16 connection with Dr. Iain Cockburn's third expert report and issues related to Java
or Android technology. He may also testify concerning documents on the exhibit
17 list that are either authored by him or were sent to him.

18 (Dkt. 840.)

19 Mr. Poore, in contrast, was on Google's original witness list. Mr. Poore has already appeared
20 and testified in Phase 2 concerning the performance testing that he did in relation to the '520 patent.

21 On Tuesday, May 8, Google disclosed 28 documents for Mr. Wong and 14 documents for Mr.
22 Poore. Many of these documents have nothing to do with the patent infringement issues that the jury
23 needs to decide in Phase 2, and could only serve to confuse the jury.

24 First, many of the documents appear to be relevant to nothing at all, much less Phase 2. For
25 example, Google's disclosures for Mr. Wong include:

26 • TX 562 (July 18, 2003 email string copying Mr. Wong on technical matters unrelated to
27 Phase 2)

- 1 • TX 541 (April 16, 2007 internal Sun email, announcing Oracle's acquisition of SavaJe
2 Technologies)
- 3 • TX 2067 (April 29, 2010 internal Oracle email copying Mr. Wong in which another
4 employee, Mr. Poore, compares the APIs in Android with the APIs in a Sun JVM
5 implementation)
- 6 • TX 2928 (October 1, 2010 internal Oracle email, discussing Oracle's own JVMs, with a
7 passing reference to competition with Android).

8 Second, many of the documents appear to be relevant only to damages, if relevant to anything
9 at all. For example, Google's disclosures for Mr. Wong include:

- 10 • TX 557 (March 7, 2006 internal Sun email copying an email distribution list to which Mr.
11 Wong was a member, describing Sun's strategies for monetizing the Android transaction then
12 contemplated with Google)
- 13 • TX 3134 (March 8, 2007 internal Sun email reporting hearsay comments from Google that are
14 critical of Java ME)
- 15 • TX 2258 (November 15, 2007 internal Sun email from a Sun employee to Sun "bloggers-
16 extra.sun.com" email list, commenting on potential changes to Sun's business model in light
17 of Android)
- 18 • TX 2723 (same email thread, with additional comments)
- 19 • TX 3463 (internal Sun email sent to Mr. Wong with pasted in comments from another
20 person's on Sun Java business strategy in response to Android)
- 21 • TX 2957 (September 28, 2010 internal email string commenting on Sun's Java ME strategy)
- 22 • TX 2462 (September 29, 2010 internal email from Mr. Wong commenting on Sun business
23 model for Java)
- 24 • TX 2948 (October 5, 2010 internal Oracle email discussing discussions between Oracle and
25 RIM related to smartphones and Android).

26 Some, but not all, of these documents were also disclosed for Mr. Poore.

27 Third, and also related only to damages if anything, many of the documents are internal Sun
28 or Oracle emails referring to internal efforts by Sun or Oracle to develop Java technology that would

1 work with Android in ways that would lessen the effect of Android's fragmentation. Such
 2 disclosures by Google for Mr. Wong include TX 2461, TX 2709 and TX 3505.

3 Fourth, many documents appear to be relevant, if at all, only to show that someone at Sun had
 4 looked at some aspect of Android technology. These documents do not establish any knowledge of
 5 any infringement by Google, and even if they did, they could be relevant at most to equitable
 6 defenses, which the Court has made clear is not to be argued before the jury. (Proceedings at RT
 7 3156:17–20. (“THE COURT: Well, I will say this. Anything that goes to an equitable defense I'm
 8 going to hear separately from the jury.”).) Such documents include TX 2416, 2460, 2461, 2464,
 9 2929, 2949, 3438, and 3509. Again, some, but not all, of these documents were also disclosed for
 10 Mr. Poore.

11 Fifth, many of the documents refer to benchmark or performance testing conducted by Mr.
 12 Vandette (who has already testified at trial) or others, on which Mr. Wong is copied only as a
 13 member of a listserv, and which concern different benchmark tests than the ones Mr. Vandette
 14 conducted. *See, e.g.*, TX 2413, 2415, 2936, 2937. The appropriate time to introduce such documents
 15 was during the examination of Mr. Vandette, who has now returned to his home in Massachusetts.
 16 Indeed, Google did question Mr. Vandette on one of these documents at his deposition, and
 17 apparently did not like his answers. If Google is permitted to offer such documents through other
 18 witnesses, who only happened to be copied on the emails, there is a substantial risk that the jury will
 19 confuse the performance testing described in those emails with the different benchmark analyses that
 20 Mr. Vandette testified about.

21 Sixth, other documents appear to be included in an attempt to introduce inadmissible hearsay.
 22 For example, TX 2703 includes statements made by James Gosling, after he had ceased to be a Sun
 23 or Oracle employee, about this lawsuit. Such statements are inadmissible hearsay, are unduly
 24 prejudicial under Fed. R. Evid. 403, and even if admissible, would only go to equitable defenses,
 25 which are not for the jury in any event.

26 Oracle brings this motion in an effort to resolve these issues in advance, and outside the
 27 presence of the jury. Google is free to make its equitable defense case to the Court, and to make its
 28 damages case in Phase 3. But the documentary evidence (as described above) that it apparently

1 intends to use with, and the testimony it hopes to elicit from, Mr. Poore and Mr. Wong has no
2 relevance to the jury's Phase 2 decisions, and should be excluded at this juncture.

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5 Dated: May 9, 2012

BOIES, SCHILLER & FLEXNER LLP

6 By: /s/Fred Norton
Fred Norton

7 *Attorneys for Plaintiff*
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